JD–144—03
Richmond, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MAYS ELECTRIC CO., INC.

and

Cases 5—CA—31247
5—CA—31371

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 666, AFL—CIO

Stan P. Simpson, Esq., for the General Counsel.
Vincent T. Mays, of Lynchburg, Virginia, for the Respondent.
Ronald B. Vest, of Sandston, Virginia, for the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Richmond, Virginia, on October 30 and 31, 2003.[1] The initial charge was filed May 15, and the complaint was issued July 31. A second charge was filed on July 29. On September 23, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing.[2]

The consolidated complaint alleges that a supervisor of the Company made statements creating an impression among its employees that their union activities were under surveillance by the Company. It is further alleged that the Company terminated the employment of Allen Morgan because he supported the Union and participated in concerted union activities. The General Counsel asserts that the Company's conduct was in violation of Section 8(a)(1) and (3) of the Act. The Company filed an answer, denying the material allegations contained in the consolidated complaint.

As described in detail in the decision that follows, I conclude that the General Counsel has failed to establish that the Company's statements would reasonably lead its employees to

[1] All dates are in 2003 unless otherwise indicated.

[2] In connection with the issuance of the complaint and consolidated complaint, the Regional Director provided notices to the Company informing it of the right to representation by counsel. (GC Exhs. 1(c) and (i).) Additional notices of the right to counsel were sent to the Company on May 16 and July 30. (GC Exhs. 1(b) and (h).) The Company's owner and president, Vincent Mays, was also informed of the right to counsel during pretrial telephone conferences. The Company elected to proceed without representation by counsel. (Tr. 7.)

assume that their union activities had been placed under surveillance. I further find that the General Counsel has shown that Morgan participated in protected union activities and that the Company was aware of his participation in those activities. I also determine that the General Counsel has met its burden of demonstrating that Morgan's participation in such activities was a substantial motivating factor in the decision to terminate his employment. Finally, I conclude that the Company has failed to meet its burden of showing that it would have terminated Morgan's employment regardless of his participation in protected union activities.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, performs electrical installation and maintenance work as an electrical contractor in the construction industry at its facility in Lynchburg, Virginia, and at worksites throughout the Commonwealth of Virginia, where it annually provides services valued in excess of $50,000 to enterprises directly engaged in interstate commerce. In conducting its business, the Company annually purchases and receives at its Lynchburg, Virginia facility goods valued in excess of $50,000 from other enterprises, each of which has received these goods directly from points outside the Commonwealth of Virginia. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[4]

II. Alleged Unfair Labor Practices

A. *The Facts*

In 1986, Vincent Mays founded the Company. It is a Virginia corporation, and he is its owner and president. Operating from headquarters in Lynchburg, Virginia, the Company performs electrical installation and maintenance work, typically involving new commercial and industrial construction projects. Depending on the extent of its current workload, the Company employs between 15 and 120 persons.

The events under consideration concern the Company's involvement in a construction project for a new Kroger supermarket being built in Chesterfield County, Virginia. The Company began its participation in June 2002. Although construction was scheduled for completion in December of that year, poor weather and problems related to site preparation resulted in considerable delays.

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[3] The transcript contains a few errors. At p. 128, l. 14, the witness was referring to "foremen" in the plural. At p. 245, l. 18, the witness actually said that Mays would "move some people or reduce *our* workforce." [Emphasis supplied.] At p. 287, l. 6, I am correctly shown as stating, "Okay." The two sentences that follow this comment are also attributed to me. Actually, the witness made these statements. The remaining errors of transcription are not significant or material.

[4] The Company's stipulations regarding jurisdiction are contained in the transcript of these proceedings at pp. 12-13.

As is the Company's practice, a foreman, James Parrish, provided supervision of the Company's work force at the Kroger site. Toward the end of January, Allen Morgan went to the site and spoke with Parrish about the possibility of employment. Morgan is a journeyman electrician and member of the International Brotherhood of Electrical Workers, Local 666. At this time, he resided in Chesterfield County, a 7 to 10 minute trip by automobile from the Kroger worksite. Parrish told Morgan to telephone the Lynchburg office and speak to Mays directly concerning possible employment.

Morgan returned to his home and phoned Mays, informing him of his professional qualifications. Mays queried Morgan regarding his desired compensation rate. After this discussion, Mays instructed Morgan to come to the Lynchburg office in order to complete the application process. An appointment was scheduled for February 3 at 10 a.m. At that time, Morgan completed an application form and took a skills examination and a practical demonstration test. Afterwards, Mays and Morgan discussed pay and agreed on a rate of $16.50 per hour. Morgan was told to report to a laboratory for drug screening. He then returned to the office and completed additional employment forms. He was given a copy of the Company's handbook and was directed to report for work at the Kroger jobsite on February 5. Throughout the application process, Morgan did not discuss his union membership with Parrish or Mays.

As agreed, Morgan reported for work as a journeyman electrician at the Kroger site on February 5. Parrish directed him to assemble light fixtures. Thereafter, he was assigned a variety of other electrical work tasks during his period of employment with the Company.

Shortly after Morgan began working for the Company, another employee, Jonathan Woods, told Parrish that Morgan "was talking to him about union business." (Tr. 252.) He elaborated by reporting that he had been "approached about joining the union." (Tr. 253.) Yet another employee, James Hamlin, also told Parrish that Morgan had talked about joining the Union. In his testimony, Parrish agreed that early on in Morgan's employment for the Company he knew that Morgan was discussing the Union and he "just assumed" that Morgan was a union member. (Tr. 257.) He denied discussing this with Mays.

According to Woods, at some point during the month of February, he overheard Parrish engaged in conversation with Hamlin and another employee, Patrick Foxworthy. The discussion took place in the worksite office trailer. Woods testified that Parrish told Foxworthy, "there might be union guys out here on the job."[5] (Tr. 193.) Woods indicated that he proceeded to get his tools, leave the trailer, and go to work.

Most of the crucial events under consideration took place on February 21. Morgan testified that on this date he began work at 7 a.m. During the morning break, at approximately 9 to 9:30 a.m., Morgan placed a union sticker on his hardhat. The circular sticker, less than 2 inches in diameter, bore the logo and name of the International Brotherhood of Electrical Workers.[6] Morgan placed it on the front of his hardhat, above the insignia of the Company. Foxworthy, Woods, and Hamlin observed Morgan's actions. Very shortly thereafter, Hamlin told Parrish about Morgan's union sticker. As Foxworthy described it, Hamlin "told James Parrish that Allen [Morgan] had a sticker on his hard hat and was trying to discuss some union activity." (Tr. 215.) According to Foxworthy, Parrish told him, "[n]ot to talk to him." (Tr. 216.) Foxworthy

[5] Although counsel for the General Counsel called Foxworthy as a witness regarding other matters, he did not question him regarding this event.

[6] An identical version of this sticker was placed in evidence. (GC Exh. 43.)

then asked Parrish if the presence of the Union at the jobsite would place "our jobs in danger?" (Tr. 216.) Parrish reassured Foxworthy, telling him that "we have plenty of work" and it was likely that he would be transferred to other jobs in Charlottesville. (Tr. 216.)

After lunch, at approximately 1 p.m., Morgan spoke to Parrish; expressing concern about the method he had been instructed to use in order to install certain outside perimeter lights near the loading dock. He told Parrish that he felt that the chosen method may fail to fasten the lights securely. Parrish suggested a modification to the installation instructions. Morgan testified that, during this conversation, he wore the hardhat with the union sticker.

At another unspecified point during the workday, Woods reported that Foxworthy and Hamlin were working on a lift at the rear of the store. Woods was nearby. Parrish approached the lift and Hamlin asked him, "what is that sticker on Allen's hat?" Parrish responded that it "looks like a union sticker." (Tr. 197.) Woods testified that Parrish then told the men not to speak to Morgan, "unless we wanted to hear bullshit that Allen would have to say because he'd probably be trying to give us a bunch of pamphlets and hand us some paperwork for us to read." (Tr. 197.)

Parrish testified that he did not see Morgan's union sticker and was not told about it by other employees. He went on to note that he had certainly seen similar stickers before, adding that it was "not unusual to see that on toolboxes, hardhats." (Tr. 244.) Parrish's denial is in direct conflict with the testimony of the three employees. It is uncontroverted that Morgan placed the sticker on his hardhat. I find it difficult to believe that Parrish would not have seen it. His comments about union "bullshit" certainly indicate that union activity was a subject of concern and interest to him. He concedes that he had taken note of union insignia on other occasions. Beyond this, I find that Morgan, Hamlin, Foxworthy, and Woods were acting in concert. They were all union supporters.[7] Although Morgan, Foxworthy, and Woods each testified, they were not asked about their plan for concerted activity. Nevertheless, it is apparent from the evidence that they were engaged in an effort to explore the Company's reaction to union organizing activity. Put another way, it is evident to me that the men were attempting to test the Company's compliance with the requirements of the Act. This explains their persistent efforts to direct Parrish's attention to Morgan's union activities and to the sticker that adorned his hardhat. Given this context, I credit the testimony indicating that Parrish had ample opportunity to observe Morgan's sticker and, even more significantly, that he was the recipient of direct reports about the sticker made by other employees.

That afternoon, at approximately 2:30, Mays visited the Kroger worksite. The testimony of various witnesses indicated that Mays typically visited the job about once a week. His visits usually lasted from 30 minutes to an hour. The visits were not regularly scheduled or previously announced. Parrish testified that during this particular visit, Mays instructed him to terminate Morgan's employment. While the two men discussed the approaching end of the Kroger job, Parrish testified that Mays did not give him a specific reason for selecting Morgan for termination.[8]

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[7] Woods testified that he has been a union member for almost 7 years. Foxworthy reported that he has belonged to the Union for over 1 year. While Hamlin did not testify, he was clearly a participant in this concerted activity.

[8] In his testimony, Mays asserted that, "I'm sure we probably discussed his [Morgan's] absenteeism, et cetera, and that was entered into the discussion to lay him off." (Tr. 100.) Mays' vague testimony as to this significant point is unimpressive. I credit Parrish's testimony that Mays did not explain his reasoning in selecting Morgan for termination. Both men were

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The workday ended at 3:30 p.m. As Morgan was putting away materials in the trailer, Parrish spoke to him. The two men were alone during the conversation. Morgan testified that Parrish told him that, "we're waiting on some parts to come in for a freezer or refrigerator or something like that, so we don't need your help right now, and we're going to have to let you go." (Tr. 182.) Morgan asked Parrish when he could return to work. Parrish directed him to speak to Mays about this. Afterwards, Morgan left the trailer and encountered Woods. Woods testified that Morgan told him "that James [Parrish] told him they were waiting on parts for the freezer and they didn't have any more work." (Tr. 198.)

On the following Monday, Morgan telephoned Mays in order to request a "pink slip." (Tr. 182-183.) He reported that he received his final check on March 1, accompanied by his termination notice. The notice, dated February 21, simply states, "We are having to lay you off today due to lack of work." It is unsigned. (GC Exh. 44.) Since his termination on February 21, the Company has not offered Morgan any employment.

On May 15, the Union filed its initial charge, including the allegation that Morgan's termination was motivated by his protected, concerted activity on behalf of the Union. (GC Exh. 1(a).) On July 29, the Union filed further charges, including the allegation that Parrish's comment to Foxworthy regarding the possible presence of union members at the jobsite created an unlawful impression of surveillance. (GC Exh. 1(g).)

B. *Legal Analysis*

1. The Status of Foreman Parrish

In order to assess the validity of the General Counsel's contentions that the Company created an impression of surveillance and unlawfully discharged an employee, it is necessary to make a preliminary determination. The General Counsel alleges that Foreman Parrish was a supervisor and agent of the Company within the meaning of Section 2(11) and (13) of the Act. (GC Exh. 1(i).) In response, the Company acknowledges Parrish's job status as a foreman, but reports that it is without knowledge necessary to admit or deny supervisory status under the Act. (GC Exh. 1(k) and Tr. 12-13.) While Section 102.20 of the Board's Rules and Regulations requires considerable specificity in responding to allegations of the complaint, I note that the Board has granted some degree of latitude when evaluating the responses of an unrepresented litigant. See *S&P Electric*, 340 NLRB No. 53 (2003). At trial, I concluded that the Company's formal position as to Parrish's supervisory status under the Act should be construed as a denial, putting the General Counsel to his proof.

Section 2(11) of the Act defines the term "supervisor" as including an individual who has "the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." The statutory language is phrased in the disjunctive and the Board has held that possession of any one of the enumerated powers is sufficient to qualify an individual as a supervisor. *California Beverage Co.,* 283 NLRB 328 (1987). Beyond mere possession of one of the enumerated indicia of authority, the Act requires that the actual use of such power be more than simply routine or clerical in nature. It must involve the exercise of independent judgment. *Browne of Houston, Inc.,* 280 NLRB 1222, 1223 (1986). In addition, the

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clear in describing their working relationship, including the fact that Mays was solely responsible for matters involving hiring and firing and did not typically solicit Parrish's input.

Supreme Court has underscored the requirement that the burden of proving statutory authority rests with the party asserting that the employee is a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

In sum, Section 2(11) of the Act sets forth a variety of indicia of supervisory status, possession of any one of which is sufficient to meet the Act's standards so long as the possessor of that particular indicia is required to use independent judgment in the exercise of the enumerated power. In this case, counsel for the General Counsel contends that Parrish possessed one of the statutory indicia, the authority to assign work.[9] (GC Br. at pp. 16-17.) There is detailed and persuasive evidence to support this contention.

In assessing Parrish's status as a foreman for the Company, consideration begins with documentary evidence. Mays testified that the Company does not possess any written job description or other documents that detail Parrish's job duties and responsibilities. The Company does maintain an employee handbook entitled, "Company Work and Safety Rules." (GC Exh. 40.) This handbook is issued to all employees at the time they are hired. The handbook informs employees that:

> Each job will have one foreman designated as being in charge. Employees working on that particular job are to follow his instructions.

(GC Exh. 40, p. 1.)

At all relevant times, Parrish was the foreman assigned to the Kroger jobsite. He reported directly to Mays. There were no intermediate levels of supervision. Parrish was the sole foreman on the job and Mays only visited the site approximately once a week for periods of no more than 1 hour at a time.

Both Mays and Parrish testified regarding Parrish's status and authority as foreman of the Kroger job. Their testimony was generally consistent.[10] Parrish noted that he has been a company foreman for 4 to 5 years. Once he was assigned the Kroger job, he obtained the drawings and specifications and "start[ed] planning the day-to-day job activities." (Tr. 234.) Mays told Parrish which employees would be detailed to the job. Parrish reported that as the work progressed, he would make specific job assignments and monitor the work to determine that it was correctly performed. On examination by counsel for the General Counsel, Parrish agreed that he was "the one who made the assignments at work." (Tr. 274.) He further agreed that he "decided who did [the job assignments] and when." (Tr. 274.) Finally, he affirmed that counsel for the General Counsel was correct when concluding, "Mr. Mays didn't control that. That was your decision[.]" (Tr. 274.)

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[9] Counsel for the General Counsel also argues that Parrish had the authority to effectively recommend discharge. (GC Br. at p. 17.) In addition, there is evidence that Parrish possessed the power to adjust employee grievances. For instance, Mays testified that, "[i]f there's a problem on the job, all the employees know you go to the foreman first." (Tr. 143.) In light of the quantum of uncontroverted evidence regarding Parrish's authority to assign work, it is unnecessary to further assess these additional indicia of supervisory authority.

[10] Parrish tended to slightly downplay his authority, perhaps in deference to his employer's feelings. Mays was more positive regarding the nature and extent of Parrish's power to assign work. To the degree it matters, I place greater weight on the testimony of the principal, Mays, rather than the testimony of the alleged agent, Parrish.

In his own testimony, Mays was quite precise regarding the scope of Parrish's powers.[11] He testified that,

> [i]t's totally his responsibility to run the job, because every day, job conditions change . . . So he's moving people constantly on the project. Every day, the task changes.

(Tr. 136.) He went on to observe that, "[e]very day, you know, he's going to assign each person to the task." (Tr. 138.) Regarding the quality of judgment exercised by Parrish in making job assignments, Mays reported that,

> [h]e's going to go on the person's skills. In other words, the foreman is observant, and he knows this guy is hired as a mechanic. He's going to watch him and make sure that he can do the work.

(Tr. 138.) Mays also confirmed that Parrish was responsible for inspection of the completed job tasks.

Perhaps the clearest confirmation of the General Counsel's contention that Parrish possessed supervisory status due to his authority to assign work came during Mays' testimony given in a somewhat different context. The topic involved the significance of an employee's possession of a government-issued journeyman's electrician card. When asked whether he told his foremen to make job assignments based on an employee's possession of such a journeyman's card, Mays responded in the negative by noting that,

> [t]he foremen, they pretty much determine what tasks are assigned to the employees.

(Tr. 128.) It is evident that Parrish was vested with the power to assign work within the meaning of the Act.

I further conclude that Parrish's authority to assign work involved the exercise of independent judgment. He was required to be familiar with the blueprints and specifications of the project and to use his knowledge of the employees' specific skills in matching each electrician to the specific job assignments. With only rare exceptions, he was the sole management official present at the worksite, a relatively complex operation. In that regard, his position was similar to that of the assistant foreman who was found to be a supervisor in *Richardson Bros. Co.,* 228 NLRB 314 (1997). In *Richardson*, the Board noted that the assistant foreman, "in carrying out his duties in connection with the monitoring and reassigning work in a department as large as the finishing department, must of necessity make judgments which are more than routine in nature." 228 NLRB at 314. The same reasoning applies to Parrish, the sole supervisor present on a significantly large commercial electrical installation project.

I agree with counsel for the General Counsel that Parrish's position is quite comparable to one described by the Board in a recent case, *Arlington Masonry Supply, Inc.*, 339 NLRB No.

[11] Mays' clear testimony on this point is corroborated by his written statement to the Board agent. On July 23, he reported to the agent that, "My foremen does [sic] all work assignments on all projects." (GC Exh. 6.)

99 (2003). In *Arlington*, an employee, Dana Justice, was alleged to be a supervisor since he was responsible for managing a garage. The only employees at the garage were Justice and one other mechanic, Wayne Pardon. In determining that Justice was a supervisor within the meaning of the Act, the Board observed that,

> [i]t is undisputed that Justice prioritizes all the maintenance work that needs to be performed on vehicles in the Employer's garage. On a daily basis, Justice assigns specific jobs to Pardon, while reserving other duties for himself. In addition, the record shows that Justice's discretion in making these assignments is in no way limited or circumscribed by the Employer. Thus, Cox testified that although he is Justice's supervisor, Cox has absolutely no input as to the manner in which Justice carries out his daily responsibilities. Justice "is the only one" making work-assignment decisions because Cox is "not there to do it. It's Dana's garage." Accordingly, we conclude that the record establishes that Justice uses independent judgment in assigning work—a primary indicia of supervisory authority. [Footnote omitted.]

339 NLRB No. 99, slip op. at p. 2. Similarly, Parrish's sole exercise of the regular power of assignment of sophisticated tasks among approximately a dozen skilled employees involved the identical degree of supervisory authority and independent judgment. As a result, I find that Parrish was a supervisor within the meaning of the Act.[12]

In the complaint, the General Counsel contends that, apart from the issue of supervisory status, Parrish was an agent of the employer within the meaning of Section 2(13) of the Act. The Board applies common law principles of agency in making this determination. An employer is responsible for the conduct of an employee if that employee acted with apparent authority with respect to the conduct under consideration. Apparent authority results from a manifestation by the employer that creates a reasonable basis for the employees to believe that the employer has authorized the alleged agent to perform the acts at issue. A key aspect of the analysis is whether the employer has used the employee in question as a conduit for transmission of information from management to other employees.[13]

In considering whether Mays clothed Parrish with apparent authority to speak and act on behalf of the Company with regard to issues involving organizational activity, I have considered a variety of factors. Parrish was the only supervisor regularly present at the jobsite. Employees were instructed to report to him and to "follow his instructions." (GC Exh. 40.) He conducted weekly meetings, assigned job tasks, inspected completed tasks, and evaluated the skills and

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[12] In concluding that Parrish is a statutory supervisor, I have also considered so-called secondary indicia to the extent authorized by the Board. Compare: *J.C. Brock Corp.,* 314 NLRB 157, 159 (1994), with *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992). Parrish possessed a variety of these secondary characteristics of supervisors. He conducted weekly safety meetings, received higher compensation than the other electricians, was the only employee authorized to use a company vehicle to commute back and forth from his home to the Kroger worksite, and was issued one of the Company's gas credit cards. When coupled with his power to assign work, these factors are probative.

[13] This summary of the Board's standard for assessment of the issue of apparent authority is paraphrased from the recent decision in *D&F Industries, Inc.*, 339 NLRB No. 73 (2003), slip op. at p. 2.

competencies of the electricians and helpers. Significantly, although he lacked the authority to discipline or terminate employees, he was assigned the duty of informing those selected when such adverse employment actions were being taken. For example, Mays instructed Parrish to notify Morgan that he was being laid off. Beyond this, Parrish was required to convey disciplinary warnings to employees and to document completion of this task in written reports maintained by the Company.

The Board has regularly found apparent authority in circumstances similar to those established here. In *Tim Foley Plumbing Services,* 332 NLRB 1432 (2000), the owner of the Company told employees "to report to Harper at a particular jobsite and direct all questions and problems to him." The Board concluded that,

> [t]he employees could reasonably believe, therefore, that when Harper made statements concerning actions that the Respondent was likely to take if a union were brought in, he was transmitting management's views and that Harper was just an additional spokesman for management's view of the organizing campaign. Under these circumstances, we find that Harper's statements . . . are properly attributable to the Respondent. [Citations omitted.]

332 NLRB at 1433. Similarly, in *Mid-South Drywall Co.,* 339 NLRB No. 70 (2003), an employee named Campbell was often the highest-ranking person on the company's jobsite. Although he lacked authority to layoff or discharge employees, he communicated these decisions to the workers. He also directed their daily job activities and served as a field supervisor who "essentially ran the jobsite." 339 NLRB No. 70, slip op. at p. 1. In finding that Campbell possessed apparent authority, the Board observed that,

> [g]iven the degree to which Campbell acts as a conduit of information to employees on their day-to-day duties, we agree with the judge that the Respondent placed Campbell "in a position where employees could reasonably believe that [Campbell] spoke on behalf of management" and had vested Campbell with actual and apparent authority to act as the Respondent's agent. [Citations omitted.]

339 NLRB No. 70, slip op. at p. 1. See also: *Speed Mail Service*, 251 NLRB 476, 476-477 (1980), and *Zimmerman Plumbing and Heating Co.*, 325 NLRB 106 (1997), enf. in pertinent part, 188 F.3d 508 (6th Cir. 1999).

The Company placed Parrish in a position as its sole supervisor regularly assigned to the Kroger jobsite and utilized him as the primary conduit of information to those employees assigned to that worksite. From this, the employees could reasonably have concluded that Parrish possessed apparent authority to speak on behalf of the Company with regard to organizational activities and related issues. I find that Parrish possessed both actual supervisory authority and apparent authority to make authoritative statements on behalf of the Company to the employees regarding the issues under consideration in this case.

2. The Impression of Surveillance Charge

The General Counsel contends that the Company created an impression among its employees that their union activities or sympathies were under surveillance by management. In particular, this allegation refers to a statement made by Parrish in February. Woods testified

that he heard Parrish tell Foxworthy that "there might be union guys here on the job." (Tr. 193.) This is the comment that is alleged to constitute a violation of Section 8(a)(1) of the Act. (GC Br. at p. 19.)

The Board has recently described the standard involved in evaluating an impression of surveillance charge, observing that,

> [i]n order to establish an impression of surveillance violation the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance.

Heartshare Human Services of New York, Inc., 339 NLRB No. 102, slip op. at p. 3 (2003). The concept underlying the prohibition of this type of employer conduct is that Section 8(a)(1) of the Act insulates employees from fear that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000).

Counsel for the General Counsel asserts that "Parrish's statement that he suspected union members were on the job would reasonably cause an employee to believe his union activities were under surveillance." (GC Br. at p. 19.) Unfortunately, he does not explain why this would be true. Certainly there is nothing explicitly contained in Parrish's remark that informs employees that the Company's belief that union members were on the job arose from surveillance of the work force.

Recently, the Board has grappled with the correct manner for assessment of statements alleged to have created an impression of surveillance in cases where such statements are vaguely phrased observations of the type under consideration here. For example, in *Grouse Mountain Associates II*, 333 NLRB 1322 (2001), enf. 56 Fed. Appx. 811 (9th Cir. 2003) [unpublished opinion], the company issued a memorandum advising its employees that "organizing activities had failed from lack of employee interest." The General Counsel contended that this statement suggested to the employees that management was engaging in surveillance of their union activities. The Board rejected this contention, noting,

> we focus on the text of the allegedly unlawful language. The comment is couched in conclusory terms. On its face, the language does not suggest how the Respondent reached its general conclusion that the union campaign had been unsuccessful. Thus, the language, by itself, does not reasonably create the impression that the Respondent engaged in surveillance of its employees' organizing activities to reach its conclusion that the union movement had not succeeded.

333 NLRB at 1323. The Board went on to examine the context of the statement and concluded that it was more reasonable for employees to assume that the company acquired its understanding of the outcome of the organizing campaign from lawful means that did not involve surveillance of protected activity. As a result, it declined to find a violation of the Act.[14]

[14] Further indication of the nature and evolution of the Board's deliberations regarding conclusory statements demonstrating employer knowledge of union activity may be gleaned

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In *Heartshare Human Services of New York, Inc.,* supra, the Board again analyzed asserted impression of surveillance violations consisting of statements by managers informing employees that they had heard that the employees had been approached by a union organizer. Upon examination of the circumstances, the Board concluded that these statements were not unlawful since it would not have been reasonable for the employees to conclude that management had obtained its knowledge of the incidents through surveillance. In reaching this result as to one of the allegations, the Board placed reliance on the fact that the managers had been informed directly about the incident by one of the affected employees.

Very recently, the Board assessed yet another vague statement alleged to have created an impression of surveillance. In *SKD Jonesville Division, L.P.,* 340 NLRB No. 11 (2003), a supervisor named Varney told an employee named Cole that "he heard that I was going to organize . . . that the employees wanted me to organize a union." 340 NLRB No. 11, slip op. at p. 1. In language directly relevant to the case under consideration, the Board rejected a finding of unlawful conduct because Varney's statement to Cole,

> could not have been reasonably understood to mean that Varney was monitoring employee conversations or somehow eavesdropping. A statement as to what someone has heard could be based on (1) what he had heard from the grapevine *or* (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former. [Emphasis in the original.]

340 NLRB No. 11, slip op. at p. 2.

By the same token, Parrish's statement to Foxworthy does not contain any suggestion that Parrish acquired his belief that there were union members on the job from any improper spying on the employees. There is simply no reason for the employees to assume that Parrish's information was derived from improper conduct as opposed to legal means of gaining such knowledge. Furthermore, the context of Parrish's comment reinforces this conclusion.

Parrish testified that, shortly after Woods was hired on February 5, the two men had a conversation. Woods told Parrish that, "Morgan and somebody was talking to him about union business." (Tr. 252.) He added that he had "gotten approached about joining the union." (Tr. 253.) As a result, Parrish testified that he "just assumed" that Morgan was a union member. (Tr. 257.) Parrish also testified without contradiction that it was "not unusual to see [union stickers] on toolboxes, hardhats." (Tr. 244.) In addition, Parrish reported that applicants for employment sometimes told him that they were union members. (Tr. 254-255.)

Given the vagueness of Parrish's comment and the surrounding evidence that demonstrates entirely plausible alternate explanations of how Parrish acquired his information regarding union membership, I conclude that the General Counsel has failed to meet its burden of establishing that employees could reasonably have concluded that Parrish obtained his information through spying or surveillance. As a result, I will recommend that this charge be dismissed.

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from discussion in *Wake Electric Membership Corp.*, 338 NLRB No. 32 (2002), slip op. at fn. 10.

3. The Termination of Morgan's Employment

The General Counsel contends that the Company's decision to terminate Morgan's employment violated Section 8(a)(1) and (3) of the Act. The Board has a precise analytical framework used to assess such allegations. In order to meet his initial burden of proof, the General Counsel must show that Morgan engaged in activity protected by the Act, and that the Company was aware of his participation in such activity. In addition, the General Counsel must demonstrate that Morgan suffered an adverse employment action and that there exists a motivational link between Morgan's conduct and that adverse action. If the General Counsel is successful in making these showings, "such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a violation of the Act has occurred." *American Gardens Management Co.,* 338 NLRB No. 76, slip op. at p. 2 (2002). At that point, the burden shifts to the Company to show that the same adverse employment action would have been imposed regardless of Morgan's involvement in protected activities. *American Gardens*, supra, citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[15] I will address each of these elements in turn.

The evidence clearly establishes that Morgan engaged in protected union activities. Almost immediately after commencing his employment, he began to discuss the Union with coworkers. Parrish testified that, in early February, Woods and Hamlin told him that Morgan had approached them and discussed membership in the Union. I have already noted that the evidence supports a conclusion that Morgan, along with other union activists, was engaged in a plan to test the Company's compliance with the terms of the Act. The Supreme Court has held that union organizers who accept employment for the purpose of discussing union membership with coworkers are entitled to the protection of the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). I find that Morgan's conduct in discussing the Union with coworkers was protected activity. *Aztech Electric Company*, 335 NLRB 260 (2001).

On the day that he was terminated from employment, Morgan placed a sticker containing the Union's logo on his hardhat. The Board has recently observed that, "[i]t has long been recognized that employees have a statutory right to wear union insignia while on their employer's premises." *Wal-Mart Stores, Inc.*, 340 NLRB No. 76, slip op. at p. 2 (2003), citing *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 fn. 7 (1945). While there are exceptions to this rule under special circumstances, they are inapplicable to this case. Indeed, Parrish testified that the Company had no prohibition on the wearing of union stickers on hardhats. He reported that such behavior was "not unusual." (Tr. 244.) Morgan's decision to wear a union logo was also protected activity.

It is uncontroverted that Morgan's immediate supervisor, Parrish, was aware of his participation in discussions concerning the Union. Parrish testified that, after he was told about the content of Morgan's discussions, he "just assumed" that Morgan was a Union member. (Tr. 257.) While Parrish denied seeing the union insignia that Morgan chose to wear on the day he was terminated, I have already noted that I find this denial to lack credibility.

While the evidence demonstrates that Parrish knew of the nature and extent of Morgan's protected activities, there is no direct evidence regarding Mays' knowledge. The absence of

[15] The Supreme Court approved the Board's methodology in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

such direct evidence is not dispositive. The Board considers a variety of circumstantial evidence on the issue of employer knowledge of protected activity. In *Metro Networks, Inc.,* 336 NLRB 63 (2001), the Board premised a finding of employer knowledge on a number of factors including the timing of the discharge of employees on the same day that they engaged in union activity and the pretextual nature of the reasons advanced by the employer to explain those discharges. Similarly, in *La Gloria Oil + Gas Co.,* 337 NLRB 1120 (2002), affd. __ F.3d __ (5th Cir. 2003), the Board based a finding of knowledge on circumstantial evidence, including timing. In addition, the Board cited the size of the work force as another factor supporting an inference of employer knowledge of union activity, noting that,

> [g]iven the small size of the work force (consisting of approximately 14 drivers), it can reasonably be inferred that [the employer] was aware of the identity of the employees involved in union activity.

337 NLRB at 1125.

In addition to the direct evidence establishing that Morgan's immediate supervisor knew of his protected activities, I find that persuasive circumstantial evidence exists to conclude that Mays had similar knowledge. While Parrish denied telling Mays about Morgan's union activities, his assertion in this regard is not credible. Parrish's comment about union "bullshit" shows that he harbored animus. (Tr. 197.) He confirmed that he did inform Mays of other employees' union membership in the past. These factors, coupled with the timing of the events on the critical day, cause me to conclude that Parrish told Mays about Morgan's protected activities. Indeed, the sequence of events is particularly striking. On the same day that Morgan chose to wear a union insignia in Parrish's presence, Mays made a visit to the worksite. Such visits were infrequently and irregularly scheduled. During this particular visit, Mays instructed Parrish to inform Morgan that his employment was terminated.

Lastly, as will be discussed in detail later in this decision, I conclude that various explanations proffered as justifications for Morgan's discharge are pretextual. This is significant since the Board has inferred employer knowledge "where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive." *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enf. 97 F.3d 1448 (4th Cir. 1996). Based on the direct evidence of Parrish's knowledge and the circumstantial evidence, including the size of the work force, the timing and sequence of events, and the assertion of pretextual reasons for the employer's conduct, I find that Mays was aware of the nature and extent of Morgan's protected activities.

Having concluded that Morgan engaged in protected activities and that the Company knew of his involvement, I must next determine whether he was subjected to an adverse employment action. There is no doubt that, since February 21, the Company has not employed Morgan. Because the Company has asserted a variety of reasons for its refusal to continue Morgan's employment, it is not clear whether it contends that it subjected Morgan to a layoff due to lack of available work, fired him for excessive absenteeism, or fired him for poor productivity. Even if it is assumed that Morgan was selected for layoff due to lack of work rather than fired for cause, the Board considers such a step to be an adverse employment action that, if taken due to an unlawful motivation, constitutes a violation of the Act. See *Equitable Resources Exploration,* 307 NLRB 730, 731 (1992), enf. 989 F.2d 492 (4th Cir. 1993) (employer's action found to be unlawful where union organizing activity was a motivating factor in the selection of employees for layoff).

The final and crucial element that the General Counsel must preliminarily establish is the existence of unlawful motivation as a substantial factor in the decision to impose the adverse employment action. The Board recently summarized the type of evidence that is probative in evaluating this question of fact:

> *Wright Line* requires the General Counsel to make an initial showing that protected conduct was a motivating factor in an employer's decision to take a disciplinary action. Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity. [Citations omitted.]

West Maui Resort Partners, 340 NLRB No. 94, slip op. at p. 3 (2003). Virtually all of these factors are present in the case under consideration.

As to direct evidence of antiunion animus, it will be recalled that on the day of Morgan's termination, Woods, Foxworthy, and Hamlin had a conversation with Parrish. They discussed the union sticker on Morgan's hardhat. Parrish advised the employees not to talk to Morgan, "unless we wanted to hear bullshit that Allen [Morgan] would have to say because he'd probably be trying to give us a bunch of pamphlets and hand us some paperwork for us to read." (Tr. 197.) The characterization of Morgan's organizing activity as "bullshit" by his immediate supervisor is direct evidence of animus. The probative weight of this evidence is enhanced by the close proximity in time between its utterance and Morgan's discharge.

The most compelling circumstantial evidence of employer animus in this case is the timing of Morgan's termination on the same day that he escalated his organizing activity by placing a union insignia on his hardhat. I agree with counsel for the General Counsel's argument that *NLRB v. Rubin*, 424 F.2d 748 (2nd Cir. 1970) places the timing issue in proper perspective. In *Rubin*, employees began an organizing campaign during the first week of June. On June 9, the union formally requested recognition as representative of the employees. On that day and the following day, the company laid off 43 of its workers. In affirming the Board's finding of unlawful conduct, the Second Circuit cited the "stunningly obvious timing of the layoffs" as a significant factor establishing antiunion motivation. 424 F.2d at 750. The timing of Morgan's termination is equally probative as it came on the heels of his exercise of his right to wear a union insignia on his hardhat.

Another of the Board's traditional tests for evaluation of employer motivation is the consistency or lack of consistency in the employer's explanations for the adverse employment action. When an employer presents multiple and conflicting explanations for its conduct, the Board has observed that,

> [it] is well established that shifting of defenses weakens the employer's case, because it raises the inference that the employer is "grasping for reasons" to justify an unlawful discharge. [Citation omitted.]

Meaden Screw Products, 336 NLRB 298, 302 (2001).

In this case, the Company has presented a bewildering array of explanations for the decision to end Morgan's employment. On the day that Parrish advised Morgan of his termination, he told him that the Company "was waiting on some parts to come in for a freezer or refrigerator . . . so we don't need your help right now, and we're going to have to let you go." (Tr. 182.) When Morgan requested a formal notice of termination, he received a letter informing him that his layoff was "due to lack of work." (GC Exh. 44.) Similarly, when the General Counsel began its investigation of Morgan's termination, the Company repeatedly asserted that the reason for its action was due to "lack of work." This phrase was used in letters written to the General Counsel on April 17 and May 20. (GC Exhs. 4 and 5). In an affidavit, Mays stated that Morgan "was laid off because of lack of work, and that's what generated the decision that was made. It was lack of work." (Tr. 164.) In its answers to the original and consolidated complaints, the Company again reported that the reason for Morgan's termination was "due to lack of work." (GC Exhs. 1(e) and 1(k)).

During the period prior to trial, the Company repeatedly characterized its sole reason for Morgan's layoff as unavailability of work. However, at trial, the Company altered its stance. Counsel for the General Counsel examined Mays regarding this point. When he asked Mays why Morgan was laid off, Mays responded by citing Morgan's record of absenteeism, noting that Morgan "didn't work a full week the whole time he was there." (Tr. 65.) Strikingly, counsel then asked Mays if there were any other reasons for the action against Morgan. Mays' succinct and definitive response was, "No." (Tr. 65.) To underscore his point, counsel later asked Mays whether he agreed that his "only criteria for selecting Allen Morgan was the fact that he had been absent" and Mays responded by simply saying, "Yes." (Tr. 70.)

Recognizing that there was a potential ambiguity in Mays' testimony as to whether Morgan's absenteeism was merely a factor in the decision to select him for an otherwise required layoff or was the sole reason Morgan was discharged for cause regardless of the Company's current workload and staffing needs, counsel sought to have Mays provide further articulation of his reasoning. The examination proceeded as follows:

> COUNSEL: If you had plenty of work, I know you testified you didn't, but if you had had plenty of work, is it your testimony you would have gotten rid of him anyway because he was a poor employee?
>
> MAYS: Correct.
>
> COUNSEL: So the fact that you didn't have work for him really wasn't a factor in the decision. He was a poor employee, and one way or the other –
>
> MAYS: Well, it was a factor, but it wasn't the only factor, but he would have been terminated.
>
> COUNSEL: Notwithstanding any availability of work anywhere?
>
> MAYS: Correct.
>
> COUNSEL: I don't want to beat a dead horse here, but the fact that you didn't have work for him did not factor into your decision

> because you would have gotten rid of him whether there had been work or there hadn't been work, because he was a bad employee?
>
> MAYS: He was a bad employee. We were getting ready to lay off, and I had to decide who was going to be laid off, and rather than keeping him on until I had to lay him off a week or two weeks later, I let him go then.

(Tr. 98.) In making these assertions, Mays directly contradicted two key aspects of the Company's prior position. First, he specifically contended that Morgan was discharged for cause, a decision taken without reference to the Company's current staffing needs. Second, he clearly stated that the Company did not have an immediate need to layoff employees due to lack of work on the Kroger project. Instead, his testimony makes it evident that the need for a reduction in work force was going to take place "a week or two weeks later" than the time of Morgan's termination.[16] (Tr. 98.) Thus, in his testimony, Mays directly and specifically disavowed the entire rationale for Morgan's termination previously articulated to Morgan himself, to the staff of the General Counsel, and to the Board in the Company's formal pleadings.

Toward the end of his examination of Mays, counsel for the General Counsel raised yet another rationale for the decision to terminate Morgan's employment. He asked Mays if it was accurate that Morgan was "not as productive as other employees" and that this "was a factor in your decision to select him for layoff." (Tr. 151-152.) Mays responded that it was a factor, noting that Morgan was a "slow" worker. (Tr. 152.) He amplified this by reporting that Morgan was slower than other journeymen electricians when it came to completing his assigned work tasks. Mays contrasted Morgan's performance with other workers, observing that "we're looking for somebody whose production is number one." (Tr. 155.) Thus, Mays articulated a third reason for Morgan's discharge, poor productivity.

The Company's inability to set forth a consistent account of its decision making process was compounded by Parrish's testimony on this key point. Parrish was asked to describe the Company's layoff policies. He responded that, "Of course you go by seniority or how you're producing, who's producing." (Tr. 247-248.) When Parrish was specifically asked why Mays chose to lay off Morgan, he testified that Morgan "was I think probably the last one hired I think, and usually that's—it's a number of things, production or last one hired." (Tr. 246.) On cross-examination, Parrish reiterated that Company policy is to base layoffs on "seniority and productivity." (Tr. 262.) Unfortunately, Mays unequivocally disputed Parrish's description of the considerations leading to Morgan's termination. As to this issue, the testimony went as follows:

> COUNSEL: You do not consider seniority?
>
> MAYS: No.
>
> COUNSEL: That's not a criteria?

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[16] Later during the trial, Mays reinforced his assertion that Morgan's termination was unrelated to the Company's need for staff, stating that Morgan "was terminated because of the absenteeism problem that we saw up front within the first three weeks there. So it wouldn't have been a matter of him being considered to put on any job." (Tr. 158.) In other words, Mays indicated that if work had been available at another appropriate Company project, Morgan would not have been considered for reassignment due to his poor attendance record.

MAYS: Not an issue. No.

(Tr. 59.) Thus, Morgan's two supervisors were unable to provide a consistent description of the process by which Morgan's employment came to an end.

During the course of this litigation, the Company has advanced conflicting reasons for the decision to discharge Morgan. Most troubling is the irreconcilable conflict between the characterization of Morgan's termination as a simple layoff deriving from lack of available work and a firing for cause divorced from any immediate need to reduce the work force and premised entirely on Morgan's poor attendance and low productivity. In *Sound One Corp.*, 317 NLRB 854, 858 (1995), it was noted that, "[t]he Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." In fact, the multiplicity of explanations in this case is reminiscent of the circumstances in *McClendon Electrical Services, Inc.,* 340 NLRB No. 73 (2003), where McClendon discharged an employee named Elgin. Elgin's formal disciplinary notice informed him that he was being terminated for insubordination and failure to complete a work shift. In finding the termination to be unlawful, the Board went on to note that,

> [a]t the hearing, McClendon added several additional reasons for discharging Elgin: (1) he was in a 90-day probationary period;[17] (2) his work was slow/lethargic and generally not good; and (3) he had some absences and was late a couple of times. These deficiencies, however, were not contained in the disciplinary notice, which set forth the other grounds discussed above. "The Company's vacillation and the multiplicity of its alleged reasons for firing [the employee] render its claims of nondiscrimination the less convincing." Indeed, "[s]uch shifting assertions strengthen the inference that the true reason was for [protected] activity." [Citations omitted.]

340 NLRB No. 73, slip op. at p. 2. Likewise, I conclude that the virtually identical reasons belatedly raised by the Company during this trial compel an inference that the real motivation for Morgan's firing was antiunion animus.

The lack of credibility highlighted by the Company's shifting rationales for Morgan's termination is further compounded by examination of the merits of the proffered reasons for his discharge. Parrish articulated the first such reason. He told Morgan that he was being laid off due to the lack of work for him to perform. Specifically, he told Morgan that they were waiting for parts for a refrigeration unit and that the lack of these parts was the precipitating cause of the layoff decision. Woods, an electrician assigned to work on the refrigeration portion of the Kroger project, confirmed that they were indeed waiting for these parts. Evidently, the freezer's light fixtures had been delivered with the wrong ballasts. Nevertheless, both Woods and Parrish testified that the manner in which this problem was solved did not lead to any reduction in workload for the staff on the project. Parrish confirmed that he ordered Woods to install the fixtures containing the incorrect ballasts since it would be a simple matter to swap the parts

[17] This mirrors another one of Mays' assertions, that Morgan was selected for layoff because he had been working for the Company for less than 30 days. According to Mays, due to Morgan's short work tenure, the Company would not be charged for unemployment benefits if Morgan were selected for layoff.

when the correct ballasts were delivered. He further confirmed that the difficulty with the freezer parts did not cause any delay in the project. In fact, as counsel for the General Counsel argues, it would appear that the need to return to the fixtures in order to swap the ballasts once the correct parts arrived actually added to the Company's workload at the project. Hence, the story that Parrish related to Morgan is simply a pretext.

The second reason articulated for Morgan's layoff on February 21, is the claim that the project was very near to completion and the Company was required to reduce its work force accordingly. In fact, Mays himself disavowed this reason during his testimony. As previously recounted, Mays testified that he anticipated a need to reduce the work force "a week or two weeks" after he discharged Morgan. (Tr. 98.) He asserted that he discharged Morgan in advance of any such workload-related need for layoffs because of Morgan's poor attendance and productivity. The Company's records corroborate Mays' testimony that he was not faced with an immediate need for reductions in staff. As indicated in the General Counsel's summary compilation of staffing records, at the time of Morgan's hiring the Company had 14 employees on the Kroger job. In the following week, the workforce was reduced to 13. In the succeeding week, it returned to the 14-employee level. At the end of that week, Morgan was discharged. The work force remained at the 13-employee level for the week after his termination. Only during the week of March 3 did the work force shrink to a significant degree. In that week and the following week, only 8 employees were assigned to the Kroger jobsite. (GC Exh. 22.) As a result, the evidence shows that Mays was correct in noting that, as of February 21, the progress of work on the Kroger project was not sufficiently advanced to require a reduction in work force. It is true that Mays' projections accurately predicted that a reduction would be required within a matter of weeks. Nevertheless, the need to reduce the work force cannot properly be cited as an explanation for Morgan's abrupt termination on the day he elected to publicly proclaim his union affiliation by wearing a union insignia.

The next proffered rationale for Morgan's discharge was his absenteeism. Morgan was employed from February 5 to 21. As the Company's employees worked 8-hour shifts, Morgan would have been expected to work a total of 104 hours during this period. Actually, he worked only 61 hours. Therefore, I agree with Mays that Morgan's attendance record was problematic. Because Morgan's attendance record would cause concern to any reasonable employer, I do not conclude that Mays' contention that Morgan was discharged for poor attendance is purely pretextual. As a result, I will defer further analysis of this issue to the final step of the evaluative process required by *Wright Line*.

The next asserted basis for Morgan's termination was his allegedly poor productivity. Mays testified that Morgan was a "slow" worker and the Company needed electricians "whose production is number one." (Tr. 152, 155.) Despite this testimony, Mays conceded that there was nothing in Morgan's personnel file reflecting any concerns about productivity. In addition, Mays confirmed that he never discussed productivity questions with Morgan and was unaware of whether Parrish had done so either.[18] It is also significant that, throughout the General Counsel's investigation of the charge involving Morgan, the Company failed to cite productivity concerns as even one factor among others leading to the adverse action against Morgan.

Given that Parrish was Morgan's immediate supervisor and the only supervisor routinely present on the worksite, his testimony as to Morgan's productivity is probative. Parrish testified that Morgan "was not swift" and "wasn't extremely productive." (Tr. 263.) Nevertheless, he

[18] Morgan testified that nobody ever raised productivity with him as an issue of concern. This testimony is uncontroverted and I credit it.

conceded that, overall, Morgan was "productive." (Tr. 263.) Put another way, Parrish described Morgan as "a knowledgeable mechanic. He knows his job." (Tr. 262.) Given the complete absence of any reference to questions of productivity in Morgan's personnel file, the similar absence of any other criticisms of Morgan's productivity, the belated timing of the Company's expressions of concern about productivity, and Parrish's overall testimony indicating that Morgan's productivity was not unacceptable, I find that the contention that Morgan's termination was the result of his poor productivity is pretextual.

The final reason for Morgan's termination was raised in Parrish's testimony. He asserted that, "[o]f course, you go by seniority" when selecting persons to be laid off. (Tr. 247-248.) The first difficulty with this alleged rationale for Morgan's discharge is that Mays, Parrish's supervisor, directly contradicted it. Mays flatly reported that seniority was not a criterion used in selecting persons for lay off. Beyond this, if seniority had been the criterion for selection, Morgan would not have been laid off. Morgan began work on February 5. Foxworthy was hired for an identical position as electrician on the Kroger job commencing February 10. As a result, if seniority had been the criterion for the layoff, Foxworthy would have been discharged.[19] Once again, the Company's officials have advanced a rationale for Morgan's discharge that is unsupported by the evidence and pretextual in nature.

Having carefully evaluated each of the Company's asserted reasons for Morgan's discharge, I find that, with one exception, they are nothing more than pretexts. The evidence clearly establishes that Morgan was not fired due to lack of work arising from missing freezer parts. Nor was he terminated because the Kroger job was nearing completion and it was necessary to make an immediate reduction in work force. By the same token, I find that Morgan was not terminated due to poor productivity and was not laid off due to his lack of seniority.[20]

In making the required *Wright Line* analysis, the Board has articulated two types of situations involving asserted employer rationales for termination of an employee. As the Board noted in *La Gloria Oil + Gas Co.*, 337 NLRB 1120 (2002), affd. __ F.3d __ (5th Cir. 2003),

> we must distinguish between a "pretextual" and a "dual motive" case. If the Respondent's evidence shows that the proffered lawful reason for the discharge did not exist, or was not, in fact relied upon, then the Respondent's reason is pretextual. If no legitimate business justification for the discharge exists, there is no dual motive, only pretext.

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[19] This point also destroys another rationale raised by Mays. Mays claimed that a factor in Morgan's discharge was his status as an employee who would not have to be paid unemployment compensation by the Company because he had been employed for less than 30 days. Since Foxworthy was similarly situated, this consideration does not explain the selection of Morgan for layoff instead of his less senior coworker.

[20] The General Counsel also asserts that the Company's animus is shown by its failure to offer Morgan a transfer to other worksites outside the Richmond area. I do not agree with this reasoning. In its employment application form, the Company asked Morgan if he were able to travel. He responded that he was not able to do so. (GC Exh. 3.) His notation on the application that the reason he was willing to leave his current job was that he was "looking for closer work" reinforced this. (GC Exh. 3.) In light of these statements made just a few weeks before his discharge, Morgan had effectively indicated to the Company that he was not available for work in other locations such as Lynchburg or Charlottesville. I do not find the Company's failure to offer him such work to be evidence of animus against him.

337 NLRB at 1126. See also *Golden State Foods Corp.*, 340 NLRB No. 56, slip op. at p. 2 (2003). In this case, the situation is slightly different. I conclude that all of the reasons raised as forming the basis for Morgan's discharge are pure pretext, save one. As to each of those purely pretextual reasons, the analysis concludes at this stage. In other words, I find that these asserted rationales did not play any role in the Company's decision-making process regarding Morgan's termination. However, I have found that Morgan's attendance record was a legitimate subject of concern and could reasonably have formed a component in the Company's decision to terminate him. Having found that Morgan's termination stemmed from antiunion animus arising from his protected activities and, to some degree, due to his deficient attendance record, I conclude that as to this one issue the case requires a dual motive analysis.

Turning to this analysis, I note that the burden shifts to the Company to demonstrate that Morgan would have been discharged for absenteeism regardless of his participation in protected activities. I conclude that the Company has failed to carry this burden. As I have observed, Morgan did have a spotty attendance record.[21] The difficulty with the Company's argument in this regard stems from the fact that, as Mays put it himself, "[w]e have problems with absenteeism quite often." (Tr. 107.) The Company's proofs utterly failed to show that in managing this frequent problem, the Company treated Morgan in a manner that was consistent with its policies and past practices. One reason for this failure is the Company's decision not to fully comply with the General Counsel's subpoena. That subpoena sought the production of all documents concerning "absenteeism and/or attendance" and all documents concerning "discharges due to . . . absenteeism." (GC Exh. 2(h).) The Company failed to provide these records, evidence crucial to reaching an understanding of how the Company dealt with the issue of poor attendance.[22]

Counsel for the General Counsel requests that I draw an adverse inference from the Company's refusal to provide its records regarding absenteeism among its work force and its response to this problem. (GC Br. at pp. 36-37). I agree that this is a measured and appropriate response to the Company's noncompliance. As the D.C. Circuit noted in urging the Board to impose this sanction where appropriate,

> [i]f a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party.

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[21] The parties did not explore Morgan's explanations for his absences. I do note that Foxworthy testified that the weather had been "horrible," causing him to miss some days due to snow and ice. (Tr. 221.) He was not subjected to any discipline for missing those days.

[22] The Company failed to provide a wide variety of records sought by subpoena. At trial, Mays asserted that he did not comply with the subpoena due to the difficulty in turning over files without making copies and due to his inability "to see the relevancy" of material being sought. (Tr. 33, 37.) The Company did not raise these issues by filing a pretrial petition to revoke the subpoena as required by Section 102.31(b) of the Board's Rules and Regulations. Beyond this, I reject these contentions on the merits. The requested items were clearly relevant and their production would not have been unduly burdensome. *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in pertinent part 144 F. 3d 830, 833-834 (D.C. Cir. 1998).

Auto Workers v. NLRB, 459 F.2d 1329, 1338 (D.C. Cir. 1972). The Board has adopted this approach, citing language from a treatise stating that,

> "where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him."

Martin Luther King Sr. Nursing Center, 231 NLRB 15, at fn. 1 (1977). This reasoning applies here. I infer that the Company's failure to produce its records regarding the manner in which it handles problems with employee absenteeism stemmed from its belief that the evidence would not have been favorable to its position.[23]

I do not rest my conclusion that the Company has failed to meet its burden of showing that Morgan would have been discharged for absenteeism regardless of his union activities merely upon an adverse inference. There is evidence in the record that sheds some light on this question. In the Company's favor, I note that Morgan was issued a written warning about his attendance record. But, what is entirely lacking from the record is evidence to show that Morgan's purported discharge for poor attendance was consistent with the treatment afforded to his coworkers. As already noted, many of the Company's employees had problems with absenteeism. No evidence was introduced to show that others had been discharged for such problems. Beyond this, the available records raise troubling questions. The Company's staffing records show that Morgan worked 61 hours out of the total of 104 hours available during his period of employment from February 5 through 21. Strikingly, those same records show that three other employees worked even less. Hamlin worked only 60.5 hours during this period. James Haag worked 56 hours and John McMahon worked only 48. There is no evidence indicating that these employees were subjected to any adverse consequence.[24]

In sum, while I do not doubt that the Company was concerned about Morgan's attendance record and that this concern played some ill-defined role in his termination, I cannot

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[23] I part company with counsel for the General Counsel with respect to other proposed sanctions. Counsel recommends that I suppress the detailed testimony of Mays and Parrish that they issued Morgan a warning letter for absenteeism. (GC Br. at fn. 15.) It is true that the Company did not introduce the letter itself into evidence. On the other hand, Morgan was not asked to testify regarding this question and never denied the existence of the warning letter. In these circumstances, I decline the General Counsel's request. In my view, Parrish and Mays' uncontroverted testimony establishes the existence of this document. Similarly, counsel requests that I conclude that Morgan had no record of absenteeism since the Company failed to produce records showing Morgan's attendance history. (GC Br. at p. 34.) I decline to impose this sanction. Records produced at trial do show that Morgan was frequently absent. Once again, although Morgan testified at length, he did not dispute his history of absenteeism.

[24] I fully recognize that this evidence is incomplete. The Company did not offer any insight into these employees' past histories or any indication that they experienced special circumstances that affected their attendance during the period under scrutiny. Thus, I must emphasize that I am not finding that these employees had worse attendance records than Morgan. I am, however, finding that the Company has utterly failed to demonstrate that it treated Morgan in a manner that was consistent with its treatment of other employees regarding the precise factor cited as the basis for Morgan's discharge for cause.

conclude that Morgan would have been discharged for poor attendance regardless of his involvement in union activities. The Company has failed to prove that it has any consistent policy of discharging employees with attendance records similar to Morgan's. The only available evidence suggests otherwise—that it continued to employ persons with attendance histories during the same period that were worse than Morgan's. As a result, it did not meet its burden under *Wright Line.*

Based on the obvious timing of Morgan's discharge, the Company's complete inability to articulate a straightforward and consistent explanation for the discharge, the Company's resort to inaccurate and pretextual explanations, and the Company's failure to demonstrate that Morgan's termination was a logical and consistent outgrowth of its policies and practices regarding its employees, I find that the General Counsel has met its burden of proving that Morgan's discharge was unlawfully motivated by his involvement in protected union activities.

Conclusions of Law

By discharging its employee, Allen Morgan, due to his participation in protected concerted activities in order to discourage its employees from engaging in these or other such activities, the Respondent has been discriminating in regard to the hire, tenure, or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. The Respondent did not violate the Act in any other manner alleged in the consolidated complaint.

Remedy

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend that it be ordered to post a notice in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Mays Electric Co., Inc., of Lynchburg, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Laying off or discharging Allen Morgan or any other of its employees or otherwise discriminating against them due to their union sympathies or their participation in protected, concerted activities.

(b) In any like or related manner interfering with, retraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Allen Morgan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Allen Morgan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Allen Morgan, and within 3 days thereafter notify Allen Morgan in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lynchburg, Virginia, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 21, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[26] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 20, 2004

Paul Buxbaum
Administrative Law Judge

JD–144—03
Richmond, VA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT lay off, discharge, or otherwise discriminate against any of you for supporting the International Brotherhood of Electrical Workers, Local 666, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Allen Morgan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Allen Morgan whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Allen Morgan, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MAYS ELECTRIC CO., INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor, Baltimore, MD 21202-4061

(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

JD–144—03
Richmond, VA

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-3113.